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No. 07-1309

In The

Supreme Court of the United States

OCTOBER TERM 2008

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EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Statement

Edmund Boyle wins this case on the government's own brief. The government concedes that under *United States v. Turkette*, 452 U.S. 576 (1981),

enterprise and pattern are independent elements of a RICO[1] offense that must be separately considered and found by the jury. *See* Ans. 25-37. Yet the Second Circuit impermissibly conflates the two, espousing a *per se* rule whereby enterprise is "functionally equivalent" to, *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985) (citations and internal quotes omitted), and "no more than the sum of the predicate racketeering acts" forming the pattern. *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983) (collecting cases), *abrogated on other grounds, Nat'l Org. For Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

Relying on *Turkette*, Boyle objected to the rule's application in this case, seeking a jury instruction that required a structured enterprise "distinct from the charged predicate acts." JA 95, 97-109, 113-14. The District Court denied the request. Instead, following circuit practice, it delivered an instruction that did not explain the need for an enterprise separate from its members' predicate crimes. JA 111-13.

That was error. In other circuits, juries are "properly instructed," consistent with *Turkette* and 18 U.S.C. § 1962(c)'s plain language, that an enterprise must have a structure "separate from the commission of the predicate acts themselves." *United States v. Korando*, 29 F.3d 1114, 1118 (7th Cir. 1994) (Flaum, J.)

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68.

(internal quotation marks omitted); *accord United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.) (jury "properly instructed" that "informal enterprise" must "exist[ ] as an organization with a structure ... separate from the predicate acts themselves"). *See also* Fifth Cir. Pattern Jury Instr. 2.78 ("The enterprise must be separate and apart from the pattern of racketeering activity in which the defendant engaged."); Seventh Cir. PJI 18 U.S.C. § 1961(4) ("The government must prove the association had some form or structure beyond the minimum necessary to conduct the charged pattern of racketeering."); Eighth Cir. PJI 6.18.1962D ("The government must ... prove that the association had a structure distinct from that necessary to conduct the pattern of racketeering activity.").

It is a given that the jury must find all the essential elements of a crime in order to convict. *United States v. Booker*, 543 U.S. 220, 230 (2005) (citation omitted). To keep § 1962(c)'s elements apart, juries must be told that enterprise and pattern are separate and distinct concepts, and that there must be something to differentiate the two. *See, e.g., United States v. McDade*, 28 F.3d 283, 295 (3d Cir. 1994) (Alito, J.) (enterprise "must be something more than simply the pattern of racketeering activity") (citations and footnote omitted).

That something is an identifiable structure beyond the predicate acts themselves. RICO primarily

targets coordinated criminality – cohesive criminal groups whose sophistication, longevity and access to resources heighten their danger and make them harder to prosecute. Those are the qualities that attracted Congress's attention and dominated its focus, driving the statute's passage and rationalizing its enhanced penalties. And they are the qualities that justified limited federal intervention in an area of traditional state concern, implicating national rather than purely local interests. *See generally, e.g.,* Br. 7, 14-15, 36-37 n.23, 53-58; *Amicus* Br. for Center on the Administration of Criminal Law 4-6, 17-28.

Structure embodies these characteristics in a shorthand "formulation that is easy to apply," *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), preserving the enterprise's vitality as a truly separate element. After all, the crime is not just committing predicate acts, but doing so "in connection with the conduct of an *enterprise*," *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) (citation and internal quotes omitted) (emphasis supplied) – the "essence"[2] of the statutory scheme and a "critical limitation" on RICO's vast scope. *Reves*, 507 U.S. at 183. And the "central element"[3] of

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[2] Lynch, "RICO: The Crime of Being a Criminal, Parts III & IV," 87 Colum. L. Rev. 920, 942-43, 954 & n.149 (1987) ("Lynch").

[3] *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006) (citation and internal quotes omitted).

an enterprise – its indispensable "hallmark"[4] – is structure.

Because the challenged instruction did not require the jury to find an enterprise separate and apart from the charged pattern – let alone a separate *structured* enterprise – Boyle's conviction cannot stand. The judgment below, and the Second Circuit's underlying *per se* rule, therefore must be vacated. Future RICO juries should be instructed, as in the Seventh Circuit, that an association-in-fact enterprise "must have a structure ... separate from the commission of the predicate acts themselves." *Korando*, 29 F.3d at 1118 (internal quotation marks omitted); *accord Masters*, 924 F.2d at 1367 (similar).

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[4] *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) (citation and internal quotes omitted).

ARGUMENT

AN ASSOCIATION-IN-FACT ENTERPRISE MUST HAVE AN ASCERTAINABLE STRUCTURE DISTINCT FROM ITS PARTICIPANTS' PREDICATE CRIMES

I. THE GOVERNMENT IMPROPERLY EQUATES ENTERPRISE AND PATTERN, ELIMINATING ENTERPRISE AS AN INDEPENDENT ELEMENT IN ALL ILLICIT ASSOCIATION CASES

At bottom, the government urges an even broader rule than the Second Circuit's. Though professing that enterprise and pattern are "distinct concepts that do not merge," Ans. 25, it actually takes the opposite tack, demonstrably meshing the two. Thus, the government appears to contend that proof of a RICO pattern will "*always*" establish the existence of an illicit association-in-fact enterprise under 18 U.S.C. § 1962(c). *Id.* 27 ("It may well be true that, when a multi-member association-in-fact exists to commit crimes and their crimes form a RICO 'pattern,' a jury could *always* infer the existence of an enterprise.") (emphasis supplied); *accord, e.g., id.* 29 (RICO "fully

engaged" where pattern of crimes committed by "group of individuals dedicated to [ ] commission of that activity and operating together to achieve it").

That is an extraordinary proposition. Contrary to the government's characterization (Ans. 27), it is *not* merely a recognition that pattern and enterprise proof may coalesce in "particular cases," as *Turkette* allows. 452 U.S. at 583. Nor is it a simple acknowledgment that evidence of the elements may overlap in "some contexts" or "certain cases," as the government would have it. Ans. 28 (citations and quotation marks omitted). Rather, the government seems to flatly assert that pattern evidence is legally sufficient to establish an enterprise in *all* § 1962(c) illicit association cases: the overwhelming majority of cases brought under RICO. *See, e.g., United States v. Weiner*, 3 F.3d 17, 23 (1st Cir. 1993). That cannot be the law.

By its terms, § 1962(c) makes it a crime to "conduct [an] enterprise's affairs through a pattern of racketeering activity." Its "predominant" elements are (1) conduct, (2) enterprise and (3) pattern. *Salinas v. United States*, 522 U.S. 52, 62 (1997) (citation omitted). Yet, notwithstanding its disclaimers, the government's position appears to collapse the enterprise into the pattern in all illicit association cases – not just "some"[5]

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[5] Ans. 28 (citation and internal quotes omitted).

or "particular"[6] ones – impermissibly merging elements (2) and (3). *See, e.g.,* Ans. 39 (equating operation of criminal "enterprise" with planning and carrying out its "criminal activity" without discernible structure). It thereby "eliminate[s]" the second element altogether, *cf. Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985), effectively reading it out of the statute. In short, the government's approach renders enterprise synonymous with pattern in virtually every prosecution brought under RICO, making it "just a[nother] name for the crimes the defendants commit[,]" *Masters*, 924 F.2d at 1367, or a bare "summation of predicate acts," *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989). It leaves the enterprise a separate element in name only, reducing it to an empty word devoid of independent meaning.

That interpretation defies § 1962(c)'s plain language, juxtaposing enterprise with pattern, by blending the two ingredients into one. It dilutes the government's burden of proof by relieving its obligation to establish each essential offense element beyond a reasonable doubt, rasing substantial Fifth and Sixth Amendment concerns. *See, e.g.,* Br. 10, 63-64. It makes the word "enterprise" superfluous in all § 1962(c) cases involving illegal associations, subverting the "longstanding canon" that avoids nullifying constructions. *Scheidler v. Nat'l Org. For Women, Inc.*, 547 U.S. 9, 21 (2006). And it contravenes *Turkette*

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[6] *Turkette*, 452 U.S. at 583.

itself, which starkly contrasted enterprise and pattern, stressing that they are "separate" and distinct concepts and that "proof of one does *not* necessarily establish the other." 452 U.S. at 583 (enterprise must "exist[ ]" as an "entity separate and apart from the pattern of activity in which it engages") (emphasis supplied).

In this regard, it is telling that *Turkette* itself involved an illicit association-in-fact. If pattern proof alone were legally sufficient enterprise evidence in *all* such cases, as the government seems to maintain, then *Turkette* presumably would have said so. Instead, it pointedly limited the evidentiary convergence to "particular cases." *Id.* That could not have been an accident.

In any event, negating a critical offense element in an entire class of cases, as the government's view effectively does, would still pose constitutional problems – even if the element has meaning in other "contexts." Ans. 28. For constitutional rights are personal, and every criminal defendant – whether charged in an illicit enterprise or not – is entitled to a jury determination of each separate element in his or her individual case. *See supra* 3.[7]

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[7] The government's *amicus* suggests that the "requirement[ ] of distinctness" between person (*i.e.*, defendant) and enterprise, together with "the proof needed to demonstrate an associat[ion]-in-fact," makes structure "superfluous." Br. for Natl. Assn. of Shareholder and Consumer Attys. (NASCAT Br.) 6-7 & n.4 (continued...)

By relegating enterprise to a "simple copy" of pattern in illicit association cases, *cf. Anza*, 547 U.S. at 486 (Breyer, J., *concurring and dissenting*), the government ultimately reads § 1962(c) as a glorified pattern statute that punishes the mere repeat commission of predicate acts. *See, e.g.*, Ans. 28-29 & n.9. In so doing, it consigns the "central"[8] enterprise component to a bare "afterthought,"[9] something akin to a *pro forma* jurisdictional device. *Contra United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("central role" of RICO's enterprise concept "cannot be

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[7](...continued)
(citation and internal quotes omitted). The argument mixes apples and oranges. At issue is distinctness between enterprise and *pattern* – not *person* – and criminal defendants are constitutionally entitled to a separate jury determination of each of those essential elements. And by *amicus*'s own account, the person/enterprise rule is inapplicable where, as here, an individual is charged in an illicit association-in-fact. *Id.* n.4; *see also, e.g.*, U.S. Dept. of Justice, *Racketeer Influenced & Corrupt Organizations: A Manual for Federal Prosecutors*, at 72 & n.98 (4th ed. July 2000) ("well established" that "an individual may be charged both as a defendant and as a member of an association-in-fact enterprise") (collecting cases); *cf. Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (requiring, and finding, distinctness between natural person and his closely-held corporation, a legal enterprise under first clause of 18 U.S.C. § 1961(4)).

[8] *Olson*, 450 F.3d at 664 (citation and internal quotes omitted).

[9] *Cf. Sedima*, 473 U.S. 508 (Marshall, J., joined by Brennan, Blackmun and Powell, JJ., *dissenting*).

overstated"). But that only adds another layer of superfluity, as RICO already includes an express jurisdictional element. *See* 18 U.S.C. § 1962(c) (enterprise or its activities must affect "interstate or foreign commerce").

Conjoining enterprise and pattern also raises significant notice issues under the Fifth Amendment's due process clause insofar as the pattern concept itself is dauntingly vague. *See* Br. 35-36 & n.22, 60-61, 64-66.[10] And in extolling pattern to the near exclusion of enterprise, the government turns RICO's purpose and policy on their proverbial heads. Functionally extinguishing an essential element is "bad enough with respect to any statute." *H.J.*, 492 U.S. at 255 (Scalia, J., joined by Kennedy and O'Connor, JJ., and Rehnquist, C.J., *concurring in the judgment*). But it is especially "intolerable with respect to RICO." *Id.* For contrary to the government's reimagining, the crux of a RICO offense is *not* just the commission of predicate

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[10] The government notes that *Turkette* preceded this Court's holding in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), that "a RICO pattern requires continuity plus relationship." Ans. 28 n.9. But the difficulty in "determin[ing] just where the enterprise ends and the [pattern] begins," *Salinas*, 522 U.S. at 65, only underscores the need for a separate structure so juries can tell the two apart. *See* Def. COA Br. at 23-25 n.12 (addressing this issue in depth). This is especially true given the pattern element's conceded breadth (Ans. 29), which makes the statute even murkier and renders the government's reading virtually unchecked. *See infra* **POINT II**.

acts. *See supra* 4. After all, those are largely prohibited under state law.

Rather, the gist of the crime is committing those acts in conducting an integrated, ongoing, separately structured "enterprise," *Anza*, 547 U.S. at 457 (citation and internal quotes omitted) – the kind that framed the legislative debate, triggered federal concerns and prompted Congress to respond with unprecedented weaponry and sanctions. *See, e.g.*, Br. 36 n.23, 53-58; Alito, "Racketeering Made Simple(r)" at 4 in *The RICO Racket* (McDowell ed. 1989) (RICO essentially makes it a crime to "function as a member of an organized criminal group"); *cf. United States v. Russotti*, 717 F.2d 27, 32-33 (2d Cir. 1983) (unit of prosecution is enterprise *plus* pattern).

Indeed, the government effectively acknowledged as much before this very Court, conceding just two years ago that:

> Congress added a specific reference to groups of individuals [because] they were thinking in terms of mob families or syndicates, criminal gangs that had no discrete status as a legal entity. ... [T]hey wanted to make sure those were covered...

Mohawk Inds. v. Williams, 05-465, 2006 WL 1194498, at *45 (April 26, 2006) (Oral Arg. Tr.). The shift in this case is curious.[11]

This is not to suggest that a jury could *never* infer the existence of an enterprise from proof of a pattern. *Turkette* itself forecloses that claim. But to say that pattern and enterprise proof may coalesce in "particular cases," 452 U.S. at 583, also implies the opposite: that there will be other cases in which they will *not* coalesce. That is, a jury might draw different inferences from the same evidence in the discrete contexts of enterprise and pattern. For example, from proof or lack of proof of continuity, role differentiation,

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[11] Taken to its logical extreme, the government's current position would seemingly permit judges to instruct juries to presume the existence of a criminal enterprise upon a mere finding of a RICO pattern. *Contra Sandstrom v. Montana*, 442 U.S. 510, 517-18 (1979) (presumption removing element from case on proof of predicate fact violates due process). Alternatively, it would enable judges to withhold the enterprise issue from juries and decide it themselves as a matter of law. *Contra United States v. Gaudin*, 515 U.S. 506 (1995) (removing essential element from jury's consideration offends Fifth and Sixth Amendment rights to due process and jury trial). And it would authorize judges to omit the enterprise element from their jury instructions in all illegal association cases, without repercussion, so long as the record contains a pattern finding or sufficient evidence to hypothesize one. *Contra United States v. Neder*, 527 U.S. 1 (1999) (jury instruction omitting essential element should be reviewed for harmless error on case-by-case basis). These hypothetical scenarios, seemingly plausible on the government's theory, illustrate its truly radical nature.

organization (formal or informal) and a framework for carrying out objectives, a jury might infer pattern but not enterprise or *vice versa*. Even the government seems to agree. *See generally* Ans. 25-37.

For that reason, the *elements* of pattern and enterprise must be considered and found separately and distinctly even though the *evidence* used to prove them may sometimes coalesce. But such separate consideration does not occur in the Second Circuit, and it did not occur under the District Court's enterprise instruction in this case. A structured enterprise requirement, faithful to § 1962(c)'s text, RICO's purpose and policy concerns, and the respect for federalism that informed them, is necessary to ensure that it will. *See, e.g.,* Br. 36-37 n.23, 53-58. Such a requirement preserves the obligatory separateness and fosters independent treatment.

Employing circular reasoning, the government insists that neither enterprise nor pattern is practically "superfluous" because it is "entirely conceivable" that one "will exist without the other." Ans. 25 (citing *Turkette*, 452 U.S. at 583). That is true in theory, but misses the point. For it assumes that *Turkette* is properly read, and juries are properly instructed, to treat pattern and enterprise distinctly. That does not

happen in the Second Circuit and did not happen here.[12]

For its part, *amicus* admits the need for a separate enterprise but denies any structure requirement. NASCAT Br. 24. In fact, the two are interwoven and mutually reinforcing, structure warranting if not conferring the enterprise's separate existence. Juries should be instructed accordingly. *See* Report of Prof. G. Robert Blakey in *Procter & Gamble Co., et al. v. Amway Corp., et al.*, No. H-9723 84 (S.D. Tex., Houston Div.), at 2 ("The *structure* and function of major organized crime groups, generally consisting of associated enterprises engaging in patterns of legal and illegal activity, was the prototype ... for federal ... racketeering legislation that I have been involved in drafting.") (available at http://www.amquix.info/pdfs/Blakely_expert_report.pdf) (as visited Dec. 30, 2008) (emphasis supplied).

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[12] Not content to effectively erase the enterprise element in illicit association cases, the government also assumes the right to offer piles of extrinsic evidence – enormously prejudicial – to demonstrate the enterprise's existence. Ans. 29-30 & n.10. But if the pattern alone is legally sufficient to establish the enterprise, as the government appears to posit, that materially alters the admissibility calculus under Fed. R. Evid. 403. *Cf. Old Chief v. United States*, 519 U.S. 172 (1997) (need for extrinsic evidence diminished where element in question is uncontested); Br. 58-63. The government cannot have it both ways.

II. THE GOVERNMENT MISREADS IF NOT REWRITES *TURKETTE*, PRESSING A BOUNDLESS VIEW OF ASSOCIATION-IN-FACT ENTERPRISES

The government fundamentally misconstrues *Turkette*, not only fusing enterprise with pattern but rendering the term completely unconstrained.

First, the government persistently cites *Turkette* for the proposition that "[t]here is no restriction upon the associations embraced by the [enterprise] definition." 452 U.S. at 580; *see, e.g.*, Ans. 11, 16 & n.3, 24, 38. In context, however, that statement merely amplified the issue presented in *Turkette* and framed its ensuing holding, which appears in the very next sentence: 18 U.S.C. § 1961(4), by its use of the phrase "any union or group of individuals associated in fact," includes "both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." 452 U.S. at 580-81. The Court was not asked to consider whether association-in-fact enterprises may be entirely devoid of structure, as the government here contends. Nor, consequently, did it purport to do so.[13] Indeed,

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[13] These facts rebut any claim that *Turkette* negatively answered the structure question. *See* NASCAT Br. 5, 21. If anything, the shoe is on the other foot. *See, e.g.*, Br. 4, 24-30, 41 (continued...)

immediately after the "no restriction" statement cited by the government, the Court went on to identify several such restrictions: the enterprise must be an "entity separate and apart from the pattern of activity in which it engages," with an "ongoing organization" and a "continuing unit" of associates sharing a "common purpose of engaging in a course of conduct." 452 U.S. at 583. Thus, whatever else it might mean, the "no restriction" statement could not have been intended in a literal, absolute or unqualified sense.

Second, complementing its exaltation of pattern as the statutory center, the government elevates *Turkette*'s "common purpose" language to the "*raison d'etre* of [an] association in fact." Ans. 35; *see, e.g., id.* 11 ("common [criminal] purpose" is "essence of such an association"), 12, 17 (no structure required beyond that implicit in "common goal of engaging in a (criminal) course of conduct"), 18-19 ("essence" of association in fact enterprise, allegedly according to *Turkette*, is "ability to pursue a common objective"), 19 n.4 (*Turkette* supposedly focused on "common [criminal] purpose" of association's members) (citation and internal quotes

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[13](...continued)
n.28. Indeed, the First Circuit's concerns about conflating enterprise and pattern (*see* NASCAT Br. 17-21) were precisely what led this Court to spell out the distinct enterprise traits – an ongoing organization existing as a separate entity with a continuing unit of associates – animating the structure requirement.

omitted), 27 & n.8,[14] 29. But as Judge Posner wrote in a related context, that reading "truncates" this Court's opinion "misleadingly," *Limestone Dev. Corp. v. Village of Lemont, Il.*, 520 F.3d 797, 804 (7th Cir. 2008), minimizing the other key enterprise attributes enumerated in *Turkette*: again, an "entity separate and apart from the pattern," with an "ongoing organization" and a "continuing unit" of associates. 452 U.S. 583. Those features – derived from § 1962(c)'s delineation of enterprise and pattern as separate elements and § 1961(4)'s express contemplation of an "entity," legally recognized or otherwise – are the structure requirement's wellspring. And the government cannot just paper them away by playing them down.

Third, and most striking, a common purpose limitation is no limitation at all, as *"[a]ny* two wrongdoers who through concerted action commit two or more crimes [always] share a purpose." *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (emphasis supplied); *cf. United States v. Ewings*, 936 F.2d 903, 906 (7th Cir. 1991) (asking, rhetorically, what criminal "doesn't" have an "'appetite' for money"?). Viewed through that prism, the government's enterprise conception is wholly unbounded; every group

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[14] "[I]f a group of individuals ... join together ... for the common purpose of engaging in a pattern of racketeering activity and, functioning as a criminal unit, actually achieve that end," they "will have created an association-in-fact 'enterprise' through their actions."

of two or more people committing predicate crimes over time automatically qualifies, becoming instant racketeers facing 20 years in prison. *See* Ans. 36-37 (essentially conceding that government theory obliterates distinction between enterprise and conspiracy). Put more bluntly, there is almost no long-term dual or joint criminal activity that would *not* be covered – particularly given the avowed breadth of the pattern component itself. *See id.* 29; *supra* n.10. That is an absurd construction, and the Court should reject it. *Turkette*, 452 U.S. at 580 ("absurd results are to be avoided") (citation omitted). Indeed, it turns the statute upside down, this Court having explicitly recognized the enterprise as a "critical limitation" on RICO's potentially infinite reach. *Reves*, 507 U.S. at 183.

In the end, the government invites this Court to rewrite if not overrule *Turkette* – and upset almost 30 years of precedent – by aggrandizing the enterprise's common purpose feature while degrading its separate entity, ongoing organization and continuing unit aspects: the very properties giving rise to the structure requirement. There is no reason to redefine the enterprise in this manner, and the government offers none.

III. A SEPARATE STRUCTURE REQUIREMENT COMPORTS WITH RICO'S TEXT AND THIS COURT'S CASES

That the word "structure" does not appear on RICO's face does not render the concept of structure "extra-textual." *See, e.g.,* Ans. 11, 14-15, 18, 23-24. To the contrary, the requirement that an association-in-fact enterprise have a structure separate and apart from the pattern of racketeering flows directly from the statutory language delineating "enterprise" and "pattern" as distinct elements of a § 1962(c) offense. *See* 18 U.S.C. § 1962(c) (making it unlawful to "conduct [an] enterprise's affairs through a pattern of racketeering activity"); *Salinas*, 522 U.S. at 62 (elements are (1) conduct, (2) enterprise and (3) pattern) (citation omitted); *cf. Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chi.*, 747 F.2d 384, 402 (7th Cir. 1984) (Cudahy, J.) (language of § 1962(c) designating "person" and "enterprise" as distinct elements "suggests that the liable person and the enterprise must be separate"), *aff'd on other grounds*, 473 U.S. 606 (1985).

Structure is also implied in the text of § 1961(4),[15] which defines "enterprise" to include two

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[15] *See NOW*, 510 U.S. at 260 (suggesting that appropriate "requirement[s]" may be "fairly implied" in RICO's "operative

(continued...)

types of entities: "any individual, partnership, corporation, association, or other legal entity," as well as "any union or group of individuals associated in fact although not a legal entity." The repetition of "entity" (Ans. 16), a term connoting structure (Br. 26-27), indicates that the salient difference between the two enterprise categories is their legal or non-legal status, and that they are otherwise similar in nature; *i.e.*, that the entities listed in the second clause – including associations-in-fact – should have a structure approximating those in the first. *See Turkette*, 452 U.S. at 583 (enterprise must have actual "existence" as "an entity separate and apart from the pattern"); *Limestone,* 520 F.3d at 804-05 ("'associated-in-fact' just means structured without the aid of legally defined structural forms such as the business corporation"). Augmenting this conclusion is the presence of labor unions in the second clause – an interpretation not seriously contested by the government (Ans. 42-43) – reinforcing that the adjacent phrase "associated in fact" contemplates an equivalent degree of structure. *See* Br. 42-44.

In contrast, punctuating the phrase "group of individuals associated in fact" while glossing over the ensuing qualifier (Ans. 17) – "although not a legal entity" – reads § 1961(4) out of context and again "truncates" the second clause "misleadingly."

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[15](...continued)
sections").

Limestone, 520 F.23d at 804; *cf.* Ans. 38 (purporting to recognize that statutory language must be "read in context") (citations and internal quotes omitted). Indeed, in the absence of structure, there is *no* "resulting entity" (*id.* 17) – legal or otherwise – when individuals merely associate together in a group without more. *See* Br. 26-27 (explaining that "entity" is defined as an independent being existing apart from its attributes and properties: here, the individuals forming the association and the acts they commit).

A structure requirement is also implicit in, if not compelled by, the holding of *Turkette*. As discussed in **POINT II**, the government defines "enterprise" primarily by reference to a group of individuals associated for a "common purpose," and secondarily, if at all, to their "function[ing] as a continuing unit," *Turkette*, 452 U.S. at 583 – language as absent from RICO's text as the word "structure." Yet, at the same time, the government backs a jury instruction that gave no effect to the rest of *Turkette*'s operative passage, requiring "an entity separate and apart from the pattern." *Id.* (further requiring an "ongoing organization," which, as the government points out (Ans. 38), also appears nowhere in §§ 1961(4) or 1962(c)). Again, the government cannot have it both ways.

Despite RICO's breadth and liberal construction clause, this Court has imposed other interpretive constraints (beyond *Turkette's* ongoing organization,

separate entity, common purpose and continuing unit tests) where, as here, they are (A) logically inferred from the statutory language; (B) consistent with RICO's history, purpose and policy; and/or (C) dictated by settled construction canons. *See supra* n.15. Most prominently, a § 1962(c) violation requires proof that the predicate acts are related and continuous, *H.J.*, 492 U.S. at 239, and that the defendant participated in operating or managing the enterprise, *Reves*, 507 U.S. at 179[16] – criteria not strictly found within RICO's four corners. *See also, e.g., Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258 (1992) (reading proximate cause requirement into 18 U.S.C. § 1964(c)); *Beck v. Prupis,* 529 U.S. 494, 504 (2000) (inferring tortious-type injury requirement to hold that civil RICO conspiracy entails acts of racketeering or that are independently wrongful). Structure is no different.[17]

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[16] That lower-rung participants may help operate an enterprise under *Reves* (Ans. 39-40 & n.11) is both undisputed and beside the point: namely, that the very notions of an operation and management test and an organizational ladder presume the existence of a structured entity capable of being operated and managed. Br. 31-34.

[17] Indeed, this Court routinely interprets statutes in ways consistent with their language but beyond the literal terms of their text. *See, e.g., Scheidler v. Nat'l Org. For Women, Inc.*, 537 U.S. 393 (2003) (finding wrongful acquisition of property implicit in Hobbs Act extortion definition); *Staples v. United States*, 511 U.S. 600, 605 (1994) (importing *scienter* requirement even though 26 U.S.C. § 5861 "silent concerning [ ] *mens rea*"); *Ernst & Ernst v.*

(continued...)

As mentioned, construing §§ 1961(4) and 1962(c) to make every pattern of racketeering an *ipso facto* association-in-fact enterprise (Ans. 27) is "absurd" – a result "to be avoided." *Turkette*, 452 U.S. at 580. Conversely, a structure requirement ensures jury consideration of the enterprise as an element "separate and apart from the pattern," *id.* at 583, vindicating RICO's federal interest in eradicating coordinated, highly dangerous activity evading conventional prosecution.

IV. ASSOCIATIVE ENTERPRISES MAY BE STRUCTURED FORMALLY OR INFORMALLY

Contrary to the government's supposition (Ans. 10, 12, 18, 28, 40, 43), we do not contend that an association-in-fact enterprise must have a formal structure. Indeed, *Turkette* itself establishes that the organization may be "formal or informal." 452 U.S. at 583. That is a "very low hurdle." *Korando*, 29 F.3d at 1117. It merely requires "some structure" beyond the participants' predicate acts – but not "much" – to distinguish the enterprise from the pattern. *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992) (Posner J.). To reiterate Judge Posner's textual analysis,

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[17](...continued)
Hochfelder, 425 U.S. 185 (1976) (engrafting civil *scienter* requirement over government objection that Securities Act § 10(b) not expressly restricted to knowing or intentional practices).

"'associated-in-fact' just means structured without the aid of legally defined structural forms such as the business corporation." *Limestone*, 520 F.3d at 804-05 (parsing 18 U.S.C. § 1961(4)).

That is a far cry from a full-blown or backdoor organized crime requirement. *Compare* Ans. 43-46 *with, e.g.,* Br. 2-3, 14-16, 54, 58. Yet it also comports with "the existence of enterprises that pursue entirely illicit goals." Lynch at 974; *see* Br. 41 n.28 and cases cited. And as a "low hurdle," *Korando*, 29 F.3d at 1117, the structure requirement is not "complex" (NASCAT Br. 8; *cf. infra* **POINT V**) – a legally invalid objection in any event. *See* Br. 62-63 n.52. After all, seven circuits apply some kind of structure test, and at least four incorporate variants in their jury instructions, without "discernible mischief" in RICO's administration. *Kushner*, 533 U.S. at 162; *see* Br. 15 n.11, 20; *supra* 2-3. In fact, the government is already proving structure in the lion's share of cases. Br. 58-63 & n.2. And if it can't carry that light burden, then RICO shouldn't be invoked, as the predicate crimes – including white-collar crimes and other frauds – are independently punishable under state and/or federal law. Br. 36-37 n.23, 62-63 n.52.

The government wrongly suggests that RICO's inclusion of a single "individual" as a potential enterprise belies any structure requirement. Ans. 12, 20-21, 41-42, 44. But individuals, meaning "sole

proprietorship[s]" as used in RICO,[18] are legal entities under § 1961(4)'s first clause ("individual, partnership, corporation, association, or other legal entity"). By hypothesis, legal entities have formal legal structures separate from any racketeering activity in which they engage. *Cf. Kushner*, 533 U.S. at 165 (corporate form distinguishes business enterprise from sole shareholder defendant). At issue, however, is whether *nonlegal* entities under § 1961(4)'s *second* clause ("union or group of individuals associated in fact although not a legal entity") require a separate structure, formal or informal. And even if individuals/sole proprietorships lacked inherent structure as legal entities, the clauses describe "separate type[s] of enterprise[s]," *Turkette*, 452 U.S. at 582, and enterprise can mean different things in different contexts. *See NOW*, 510 U.S. at 258-59.[19]

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[18] Blakey & Gettings, "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies," 53 Temp. L.Q. 1009, 1023 n.81 (1980). *Cf. Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992); *McCullogh v. Suter*, 757 F.2d 142, 143 (7th Cir. 1985) (Posner, J.); 18 U.S.C. § 1961(3) (contrasting "person" with "individual") (internal quotation marks omitted).

[19] The hypothetical at pages 26-27 of the government's brief is inapposite on its face. It does not posit a "group of individuals associated in fact," 18 U.S.C. § 1961(4) – whether established by the pattern or otherwise – and there is no dispute that a properly instructed jury *could* find a pattern without necessarily finding an enterprise. *See supra* 13-15. At issue is whether Boyle's jury *was*

(continued...)

Similarly, the government's claim that the prospect of two-member enterprises undermines any structure requirement (Ans. 12, 20) mistakenly assumes the structure must be "formalistic." *Id.* 12; *contra supra* 24-25. In fact, two-person associations may be structured in any number of informal ways, either generally (*e.g.*, copartners; leader/subordinate; first among equals; mentor/apprentice; principal/agent; beneficiary/nominee) or specifically, through fixed roles extending over time (*e.g.*, buyer/seller; importer/exporter; wholesaler/retailer; supplier/distributor; briber/recipient; thief/fence; triggerman/wheelman; steerer/swindler; tipper/tippee; pimp/prostitute; recruiter/alien smuggler; issuer/broker; trafficker/launderer; loan shark/collector, *etc*). The possible configurations are many and varied. *See, e.g., United States v. Nabors*, 45 F.3d 238, 240-41 (8th Cir. 1995) (structured enterprise distinct from pattern properly alleged even if comprised solely of two named defendants); *Crowe v. Henry*, 43 F.3d 198, 204-05 (5th Cir. 1995) (structured two-person enterprise existing separate and apart from pattern); *American Mfrs. Mut. Ins. Co. v. Towson*, 912 F. Supp. 291, 295-96 (E.D. Tenn. 1995) (association-in-fact marital enterprise); *cf.*

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[19](...continued)
properly instructed. And as demonstrated in our opening brief and throughout this reply, the answer is "no." *Cf. United States v. Korfant*, 771 F.2d 660, 663 (2d Cir. 1985) (participation of single "common actor" does not establish conspiracy) (citations omitted), *overruled on other grounds*, *United States v. Calderone,* 917 F.2d 717 (2d Cir. 1990).

Reves, 507 U.S. at 184 (enterprise might be operated covertly or horizontally, not just vertically, by illicit means like bribery). The distinction between such structured enterprises and those lacking structure, however subtle, still differentiates the two, promoting separate jury consideration of all essential elements.[20]

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[20] The supposed "anomal[y]" conjured by *amicus* – a structure requirement would exclude "large [heroin] operation[s]" but arguably not "small-time criminals jointly [and infrequently selling] drugs" and guns – is illusory and misdirected, having nothing to do with structure. NASCAT Br. 27-28 (quoting *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983)) (internal quotation marks omitted). It rests, instead, on the faulty premise – subsequently discredited in *H.J.*, 492 U.S. at 240-41 & n.3 – that a RICO pattern requires proof of multiple schemes. Since an enterprise may be wholly criminal, *Turkette*, 452 U.S. at 580-81, and a single scheme or purpose will suffice, a structured heroin operation or other narcotics organization is a textbook association-in-fact, falling squarely within RICO's heartland. *See, e.g., United States v. Jones*, 482 F.3d 60, 69-70 (2d Cir. 2006).

Nor will a structure requirement thwart RICO political corruption prosecutions. NASCAT Br. 29-31. Criminal penetration of governmental units was among RICO's core concerns. And, like the legal entities previously discussed, government enterprises will always have a structure independent of any predicate acts committed – the kind of structure illicit associations-in-fact should loosely resemble. *See generally* Br. 53-58.

V. A SEPARATE STRUCTURE TEST IS SIMPLE, STRAIGHTFORWARD AND EASY TO APPLY

"Structure" is not amorphous, indefinite or vague, Ans. 12, 14, 22-23, 50; merely saying it does not make it so. Rather, structure is a plain English word, self-defining and readily understood. Requiring a structured enterprise distinct from the predicate acts is no more "ambiguous" or imprecise, *id.* 14, 50, than the other RICO criteria identified by this Court: a separate entity existing as an ongoing organization, with a common purpose and a continuing unit of associates, *Turkette*, 452 U.S. at 583; a related and continuous pattern of predicate acts, *H.J.*, 492 U.S. at 239; participation in the enterprise's operation and management, *Reves*, 507 U.S. at 179, *etc.* Properly instructed juries have applied those factors with no apparent problem; nothing suggests that structure will prove any harder. Indeed, juries are called upon to make far more complicated factual determinations in a variety of contexts, including tax, antitrust, money laundering and securities cases.[21]

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[21] *See, e.g., Boulware v. United States*, 128 S. Ct. 1168, 1173-74 (2008) (jury must evaluate the existence of earnings and profits to assess the consequences of a corporate distribution to its shareholder and determine whether a tax deficiency exists); *United States v. Santos*, 128 S. Ct. 2020 (2008) (jury must ascertain whether gambling business generated net profits, over and above gross receipts, to determine if money laundering violation exists);

(continued...)

The government shows too little faith in jurors[22]; there is simply no reason to believe that a structure requirement will be any more difficult than any other requirement they are regularly asked to apply. The cases cited in the government's own brief illustrate that jurors instinctively grasp the concept of structure and have little trouble either applying the test or returning convictions. Ans. 32-33.

Although a universal definition of "enterprise" is elusive – precisely because of RICO's intended versatility, *id.* 24 – its existence is a question of fact for a jury properly instructed[23] that the enterprise must have a structure "separate from the commission of the predicate acts themselves." *Korando*, 29 F.3d at 1118 (internal quotation marks omitted). The instruction can (but need not) be supplemented with appropriate

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[21](...continued)
Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (elements of Securities Act § 10(b) violation include (1) material misrepresentation or omission; (2) scienter; (3) connection with stock purchase or sale; (4) reliance; (5) economic loss; (6) causal connection between loss and material misrepresentation); *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (elements of Sherman Act § 2 antitrust offense include monopoly power in relevant market and anticompetitive conduct).

[22] *Contra Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[23] *See, e.g., United States v. Pelullo*, 964 F.2d 193, 211 (3d Cir. 1992).

examples in particular cases, indicating that the requisite structure may be shown by factors including:

- hierarchy, *United States v. Chong*, 419 F.3d 1076, 1080-81 (9th Cir. 2005); *contrast* JA 45 ("no organization at all") (testimony of Christopher Ludwigsen a.k.a. Paciello); 47 ("no leadership") (Paciello), 79 (no leaders or organization) (testimony of Gerard Bellafiore);

- division of labor or role differentiation, *United States v. Lemm*, 680 F.2d 1193, 1999-2000 (8th Cir. 1982) (arson-for-profit ring with specific participants serving as property finder, insurance adjuster, real estate financier);

- unique *modus operandi*, *Bledsoe*, 674 F.2d at 666;

- framework for making decisions and chain of command for carrying them out, *United States v. Riccobene*, 709 F.2d 214, 222, 224 (3d Cir. 1983) (overseeing, "clearinghouse and coordination function"; mechanism "for controlling and directing [group] affairs" on ongoing rather than *ad hoc* basis);

- professionalism and sophistication of organization, and diversity and complexity

of crimes, *Turkette*, 452 U.S. at 579; *United States v. Torres*, 191 F.3d 799, 807 (7th Cir. 1999);

- membership dues, rules and regulations, *United States v. Mejia*, 545 F.3d 179, 183 (2d Cir. 2008); *United States v. Feliciano*, 223 F.3d 102, 107, 109-10, 114, 116 (2d Cir. 2000); *contrast* JA 83 (no group "requirements") (Bellafiore); *cf. Limestone*, 520 F.3d at 804 ("Chicago Vice Lords would be embarrassed to have so little structure") (citation omitted);

- longevity, *Korando*, 29 F.3d at 1119;

- coherent existence in "intervals" between predicate acts, *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985), "independent of the[ ] individual crimes," *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999); *see also Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1462 (5th Cir. 1991); *contrast* JA 45 ("Each individual crime withstood by itself") (Paciello), 83 (similar) (Bellafiore), 47 ("it was just who was available to do the crime when it came up") (Paciello), 74-75 (similar) (Bellafiore);

- uncharged or additional crimes aside from predicate acts, *United States v. Leisure*, 844

F.2d 1347, 1363 (8th Cir. 1988) ("concerted attempt to gain control of [ ] local unions, which can be viewed in complete isolation from the group's pattern of racketeering activity");

- internal discipline mechanism, *Jones*, 482 F.3d at 70; *United States v. Pimentel*, 346 F.3d 285, 288-89 (2d Cir. 2003) ("strict rules of behavior that are brutally enforced");

- enterprise "name," *United States v. White*, 116 F.3d 903, 924 (D.C. Cir. 1997), "sense of belonging" and self-identification as members, *United States v. Nascimento*, 491 F.3d 25, 33 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008); *contrast* JA 59 (no group name) (Bellafiore), 86 (same) (testimony of Blas Salvatore "Fat Sal" Mangiavillano), 94 (Mangiavillano "[n]ever heard the name The Boyle Crew");

- regular meetings regarding enterprise affairs, *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (gang "had 'sessions' where important decisions were made"); *United States v. Smith*, 413 F.3d 1253, 1268 (10th Cir. 2005) ("weekly meetings, even when some members were

incarcerated"); *contrast* JA 76, 83-84 (no regular meetings) (Bellafiore);

- reinvestment of proceeds to promote and expand the enterprise, *Tillett*, 763 F.2d at 632 (jointly purchased trucks, smuggling boat and other equipment); *Torres*, 191 F.3d at 807 ("well-equipped, sophisticated group"); *contrast* JA 60, 66 (commercial hardware, Radio Shack electronics; no evidence jointly purchased, with or without enterprise proceeds) (Bellafiore);

- revenue sharing and financial contributions, *United States v. Kragness*, 830 F.2d 842, 857 (8th Cir. 1987) (members of "organization made investments in its criminal future" to purchase assets "used repeatedly over the course of a number of criminal episodes");

- joint property ownership, *United States v. Darden*, 70 F.3d 1507, 1520-21 (8th Cir. 1995) ("stash pad" to store drugs and firearms);

- protection of enterprise members, property, activities and territory, *United States v. Davidson*, 122 F.3d 531, 535 (8th Cir. 1997) ("numerous acts of retaliation and

intimidation"); *Jones*, 482 F.3d at 69-70; *Smith*, 413 F.3d at 1267-68;

- mechanisms to avoid detection and prosecution, *Masters*, 924 F.2d at 1367;

- payment of members' legal fees, *United States v. Simmons*, 923 F.2d 934, 949 (2d Cir. 1991); *contrast* JA 81-82 (no such obligation) (Bellafiore); and/or

- induction or initiation ceremonies and rituals, *United States v. Yannotti*, 541 F.3d 112, 122 (2d Cir. 2008).

Few if any of these factors were present in Boyle's case. Even the government's account of the facts discusses only the charged pattern of racketeering, essentially conceding the absence of a separate structure. Ans. 2-6. And the account itself is significantly overdrawn. By its special verdict, the jury found that Boyle participated in a narrow enterprise that committed three discrete bank burglaries from Dec. 1998 to Jan. 1999 – in New York, New Jersey and Wisconsin – based solely on the testimony of cooperating witness Bellafiore. Def. COA Br. 8; Def. COA App. 834; JA 51. The jury found no other proven predicate acts, apparently declining to credit the supporting testimony of the remaining two cooperators, Mangiavillano and Paciello, who, notably, had nothing to do with 1998-99 bank burglaries. JA 43, 49 (Paciello

met Boyle twice in 1994 and never saw him again); T:816-19, JA 89 (Mangiavillano allegedly burgled only one night deposit box with Boyle, in 1996, uncharged and never passed on by any jury).

Because the evidence failed to establish a structured enterprise separate and apart from the three proven predicate acts – showing only a clutch of bank burglars dividing their loot – Boyle's conviction must be vacated and the RICO counts dismissed. *See* Br. 71 and cases cited; *cf. Santos*, 128 S. Ct. at 2026-27 (plurality opinion) (rejecting interpretation of 18 U.S.C. § 1956 whereby "any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares") (footnote omitted). Alternatively, because a properly instructed jury surely could have refused to find a separate structured enterprise, Boyle is entitled to a new trial, or at least a remand to the Second Circuit to conduct harmless error analysis. *See* Br. 71; *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532-33 (2008) (*per curiam*).

CONCLUSION

For the reasons stated here and in our opening brief, the Second Circuit's judgment should be vacated.

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